

Russell Kennedy Webinar: Lease restructures – Divesting leasehold interests

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Webinar housekeeping

- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Surrender



Surrender

'Right' to surrender?

- Does the lease contain a 'right' to surrender (eg. a break clause)?
- Must be a contractual right specified in the lease itself. Otherwise, relies on negotiation and agreement between landlord and tenant.
- Are there other documents which may be impacted by the surrender (e.g. an agreement for lease, or an incentive deed)?

Surrender compared to other divestment options

- Likely to be preferable from tenant perspective.
- Less appealing to landlord.

Surrender

Key considerations

- Terms of the surrender
- Surrender fee
- Other amounts payable under the Lease (e.g. rent incentives, deferrals, COVID rent relief issues)
- Security deposit / bank guarantees
- Relevant third parties affected by the surrender
- Releases / indemnities with respect to lease obligations
- Tenant's make good obligations when the lease ends
- Abandoned property
- Conditions precedent
- Costs

It is important to document a surrender by way of a deed of surrender.

Surrender – NSW

Registration

- **Section 53 of the Real Property Act 1900 (NSW) and Section 16 of the Retail Leases Act 1994 (NSW)** - three (3) years or more required to be registered
- Surrender of Lease - prescribed NSW Land Registry Services
- To be **registered**
- **Surrender by operation of law** - Request form - evidence of either an act or omission of the tenant
- Must satisfy examiner from the NSW LRS

Assignment



Assignment

'Right' to assign?

- Is there a restriction in the lease?
- Common law vs Property Law Act 1958 – landlord to act reasonably in giving consent.
- Leases generally provide for a process for the tenant to comply with in seeking the landlord's consent.

When can the landlord refuse consent?

Reasonable refusal:

- The proposed new tenant's references were not satisfactory.
- The proposed new tenant's use of the premises was not acceptable to the landlord.
- The financial position of the proposed new tenant was not acceptable.

Unreasonable refusal:

- The landlord wants possession.
- The landlord's main aim is to gain an advantage, e.g. a surrender of the lease.
- To get a higher rent from the new tenant.

Assignment (cont.)

Retail Leases

Landlord obligations

The landlord can only withhold consent if:

- the proposed use of the retail premises is not permitted under the lease; or
- the proposed new tenant does not have sufficient financial resources or business experience to meet the obligations under the lease; or
- the tenant has not complied with the reasonable assignment provisions under the lease; or
- if the assignment is in connection with a lease that will continue to be used for carrying on an ongoing business, the tenant has not provided the proposed new tenant with business records for the previous 3 years or such shorter period as the tenant has carried on business at the retail premises.

Assignment (cont.)

Retail Leases (cont.)

Tenant obligations

The tenant must comply with the procedure set out in the Retail Leases Act:

- A request for consent to be in writing.
- The tenant must provide sufficient information that the landlord reasonably requires about the financial resources and business experience of the proposed new tenant.
- Before requesting the landlord's consent, the tenant must provide the proposed new tenant with a copy of any disclosure statement given to the tenant concerning the lease; and, details of any changes the tenant is aware that could affect the information in the disclosure statement.
- If the premises will be used for carrying on an ongoing business, the tenant must give the landlord and proposed new tenant a disclosure statement in the form prescribed by the regulations.

Assignment – NSW

- Transfer of Lease to be registered
- Prescribed form – NSW Land Registry Services
- Stamp duty payable

Subleases



Sublease

Key considerations

The nature of a sublease

A sublease is a separate lease by the tenant to a subtenant. The tenant remains liable to the landlord under the terms of the head lease, and the subtenant has obligations to the tenant under the sublease.

What are the terms of the head lease?

This is important because:

- Unless the lease specifically imposes constraints on subletting, the tenant has a right to sublease.
- The lease sets out the limitations on a tenant's right to sublet the premises.
- Leases that are retail leases under the *Retail Leases Act 2003* (Vic) may still allow a landlord an absolute discretion to refuse consent to a sublease, licence or concession (section 63(a)).

Sublease

Key considerations (continued)

What are the terms of the sublease?

- Are the terms of the sublease consistent with the terms of the head lease?
 - important from landlord's perspective to ensure there are no departures from the terms of the headlease;
 - important from a tenant's perspective to minimize risk.
- Is the sublease a retail lease?
- The term of the sublease must be at least one day less than the term of the head lease.
- What is the permitted use?
- When does the sublease end?
 - At the expiration of the term of the sublease.
 - On expiration or termination of the head lease.
 - Surrender issues – sublease will continue unless the sublease specifies that the sublease will end. (s 139 *Property Law Act 1958* (Vic)).

Sublease

Key considerations (continued)

Landlord key considerations:

- Are the terms of the sublease consistent with the terms of the head lease?
- Does the sublease ends if the head lease ends?
- Are there any obligations a landlord may wish to enforce against a subtenant or releases/indemnities the landlord wishes to seek from the subtenant?

Tenant key considerations:

- Are the terms of the sublease consistent with the terms of the head lease?
- Does the *Retail Leases Act 2003* (Vic) apply?
- Are there sufficient protections for the tenant against potential breaches of the head lease by the subtenant?

Subtenant key considerations:

- Security of tenure issues. The ability for the subtenant to:
 - be notified of and remedy a breach by the tenant;
 - seek a lease directly form the landlord in the event of the head lease expiring or being terminated.

Sublease – NSW

- Sublease to be registered
- *Retail Leases Act 1994* (NSW) s 42 – lessor may refuse consent to grant of sublease in lessor's discretion.

**Other issues – dealing with
incentives and rent deferrals**



Other issues – dealing with rent deferrals and incentives

Key considerations

Rent deferrals

- Covid-19: Legislation:
 - NSW: COVID-19 Legislation Amendment (Emergency Measures) Act 2020 and then the Retail and Other Commercial Leases (Covid-19) Regulation 2020 and Conveyancing (General) Regulation 2018 Schedule 5
 - Victoria: COVID-19 Omnibus (Emergency Measures) Act 2020 and then there was the Covid-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020
- Repayment: over the greater of the balance of the term of the lease or a period of no less than 24 months

Other issues – dealing with rent deferrals and incentives

Key considerations

Incentives

- Incentive deeds
- Clawback:
 - GWC Property Group Pty Ltd v Higginson [2014] QSC 264
 - Finetea Pty Ltd v Block Arcade Melbourne Pty Ltd (Building and Property) [2019] VCAT 152
- Assignment: Clawback and/or termination of rental abatement
- Tax implication of early termination or surrender of lease
- Landlord's selling the premises and accelerated incentives

Q&A – Russell Kennedy Contacts



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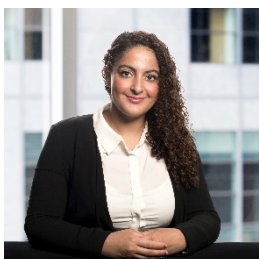
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